

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
AIRCOM CONSULTANTS, INC.)	FCC File No. 0000014657
)	
Request for Waiver of 47 C.F.R. § 1.2109(b))	

ORDER ON RECONSIDERATION

Adopted: February 10, 2003

Released: February 11, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On November 2, 2001, AirCom Consultants, Inc. (AirCom)¹ requested reconsideration of the denial of its request for waiver of the Commission's down payment and default rules and dismissal of the above-captioned application.² For the reasons set forth below, we deny AirCom's Petition.

II. BACKGROUND

A. Local Multipoint Distribution Service Auction

2. AirCom was the winning bidder in the Local Multipoint Distribution Service (LMDS) Auction (Auction No. 23) for the Gallup, New Mexico (BTAs 162A and 162B); St. George, Utah (BTA 392B); Eagle Pass, Texas (BTA 121A); El Centro, California (BTA 124A); Yuma, Arizona (BTA 486A); and Las Cruces, New Mexico (BTA 244B) markets.³ AirCom's net winning bids totaled \$1,545,500.00.⁴ Winning bidders were required to file long-form applications (FCC Form 601) and submit to the Commission such additional funds as were necessary to bring their total deposits up to twenty percent of their high bid(s) by May 28, 1999.⁵

¹ At the time it filed its application, AirCom's name was AirCom Communication Consultants, Inc. Prior to the filing of its Petition, AirCom changed its name to AirCom Consultants, Inc. AirCom Communications Consultants, Inc., Petition for Reconsideration at 1 n.1 (filed Nov. 2, 2001) (Petition).

² AirCom Communication Consultants, Inc., *Order*, 16 FCC Rcd 17685 (WTB PSPWD PRB 2001) (*Order*).

³ Before the start of the auction, AirCom submitted an upfront payment in the amount of \$41,339.00. On May 14, 1999, the Commission announced the close of the auction, the winning bidders for licenses and the remaining payment requirements. *See* Local Multipoint Distribution Service Auction Closes, *Public Notice*, 14 FCC Rcd 8543, 8543 (1999). *See id.* at 8560, Attachment B (indicating receipt of \$41,339 as AirCom's upfront payment and a balance of \$267,761 to satisfy its down payment obligation).

⁴ *See id.* at 8544, 8557, 8558.

⁵ *Id.* at 8554. *See also* 47 C.F.R. § 1.2107.

3. To comply with Section 1.2107(b) of the Commission's Rules, AirCom was therefore required to deposit an additional \$267,761.00 by May 28, 1999.⁶ On May 26, 1999, the Navajo Nation submitted \$68,848.00 to the Commission on behalf of AirCom.⁷ This remittance brought the total amount of money on deposit for AirCom to \$110,187.00, leaving a balance of \$198,913.00 needed to satisfy AirCom's down payment obligation. Although AirCom timely filed its long-form application, no further deposits of funds were made to the Commission. As a result, AirCom defaulted on its down payment obligation.⁸

B. AirCom's Long-Form Application

4. On July 13, 1999, AirCom submitted an amended FCC Form 601⁹ and filed its initial waiver request seeking to acquire three of the seven licenses for which it was a winning bidder.¹⁰ In so doing, AirCom disclosed, for the first time, that AirCom had bid on behalf of the Navajo Nation for three licenses (BTAs 162A, 162B and 392B), and intended to transfer those licenses to the Navajo Nation.¹¹ In addition, AirCom indicated that it had bid on behalf of Javier Castro (Castro) for the remaining four licenses.¹² According to AirCom, it had entered into a bidding and financial arrangement with both the Navajo Nation and Mr. Castro whereby the Navajo Nation and Mr. Castro agreed to submit the down payments associated with the respective BTAs.¹³ On June 9, 2000, AirCom submitted an amended waiver request asking that the Commission allow it to acquire all seven of the subject licenses upon remission of the full payment owed.¹⁴

5. On October 3, 2001, the Policy and Rules Branch (Branch) of the Public Safety and Private Wireless Division, Wireless Telecommunications Bureau denied AirCom's initial and amended waiver requests, dismissed AirCom's application and assessed an initial default payment against AirCom.¹⁵ In particular, the Branch determined that AirCom failed to show that its waiver request would

⁶ Twenty percent of AirCom's high bid, \$1,545,500, is \$309,100. Since \$41,339 was already submitted to the Commission on AirCom's behalf in connection with Auction No. 23, the remaining amount due for the down payment was \$267,761.

⁷ See AirCom Communications Consultants, Inc., Petition for Limited Waiver and Request for Expedited Treatment at 2 (filed July 13, 1999) (Waiver Request); see also Letter from Mitchell F. Brecher, Greenberg Traurig, to Magalie Roman Salas, Secretary, Federal Communications Commission (May 21, 2001) (AirCom Letter I).

⁸ 47 C.F.R. § 1.2107(b).

⁹ Application for Wireless Bureau Radio Service Authorization, FCC Form 601, as amended, submitted by AirCom Communication Consultants, Inc. (filed July 13, 1999) (Long-Form Application).

¹⁰ See Waiver Request at 1-2, and 4.

¹¹ See *id.* at Exhibit A; see also Long-Form Application at Exhibit A.

¹² Waiver Request at 2. Mr. Castro was not listed in either AirCom's FCC Form 175 Application or Long-Form Application for BTAs 121A, 124A, 486A and 244B. AirCom only disclosed Mr. Castro's role in its waiver requests.

¹³ Waiver Request at 3-4, 10.

¹⁴ AirCom Communications Consultants, Inc., Amended Petition for Limited Waiver and Expedited Treatment at 2 (filed June 9, 2000); see also AirCom Letter I (requesting expedited treatment of AirCom's pending requests).

¹⁵ See *Order*, 16 FCC Rcd at 17691 ¶ 16.

not frustrate the underlying purpose of the Commission's Rules.¹⁶ Moreover, the Branch found that AirCom's reliance on certain cases for support of its waiver request was misplaced because the Commission has never waived the default rules where an applicant has failed to make its initial down payment.¹⁷ Lastly, the Branch noted the Commission's well-established policy that a third party's failure to perform in accordance with a business agreement is not an unusual circumstance warranting grant of a waiver of the Commission's Rules.¹⁸ On November 2, 2001, AirCom filed the instant Petition.

III. DISCUSSION

6. Section 1.925 of the Commission's Rules provides that waivers will not be granted unless the petitioner affirmatively shows that either a) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of a waiver would be in the public interest; or b) in view of unique or unusual circumstances, application of the rules would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁹ AirCom alleges that the facts it presents support grant of a waiver under either prong of Section 1.925(b)(3).²⁰ In support of its argument, AirCom contends that grant of a waiver would be consistent with the underlying purposes of the default rules because it was not a speculative bidder.²¹ Further, AirCom maintains that a waiver would be in the public interest because it would help ensure that residents of the Navajo Nation's tribal lands receive advanced wireless services.²² AirCom also argues that this case presents unique or unusual circumstances because Mr. Castro's failure to make a timely payment impacted an innocent third party, the Navajo Nation.²³ Finally, AirCom suggests, in the alternative, that it should be allowed to default on four of the licenses and reinstate the applications for the St. George and Gallup markets, BTAs 392B, 162A and 162B respectively.²⁴

7. In evaluating AirCom's Petition, we are mindful that "[i]t is settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected."²⁵ We note that the majority of AirCom's arguments were previously considered and rejected by the Branch. Nonetheless, after full consideration of AirCom's Petition, we conclude that the *Order* correctly determined that grant of a waiver of the default rules was not warranted under the circumstances presented. In addition, we find that AirCom has failed to present any new facts or

¹⁶ *Id.* at 17688-89 ¶ 10.

¹⁷ *Id.* at 17689 ¶ 11.

¹⁸ *Id.* at 17690 ¶ 14.

¹⁹ 47 C.F.R. § 1.925(b)(3).

²⁰ Petition at 9.

²¹ *Id.* at 9-10.

²² *Id.* at 15-18.

²³ *Id.* at 18-19.

²⁴ *Id.* at 19-21.

²⁵ See S&L Teen Hospital Shuttle, *Order on Reconsideration*, 17 FCC Rcd 7899, 7900-01 ¶ 3 (2002) (citing Mandeville Broadcasting Corp. and Infinity Broadcasting of Los Angeles, *Order*, 3 FCC Rcd 1667 ¶ 2 (1988); M&M Communications, Inc., *Memorandum Opinion and Order*, 2 FCC Rcd 5100 ¶ 7 (1987)).

arguments that warrant a different conclusion. Accordingly, for the reasons discussed below, we deny AirCom's Petition.

8. Specifically, we find AirCom's contention that it was not a speculative bidder seeking to "shop" its winning bid to be unavailing.²⁶ As the Branch noted in the *Order*, the Commission has concluded that strict enforcement of the first down payment requirement is necessary in order to deter insincere bidders from winning licenses.²⁷ Failure to enforce the down payment rule affects not only the integrity of Auction No. 23, but also that of subsequent auctions. The Commission has stated that a bona fide ability to pay, demonstrated by a timely initial down payment, is essential to a fair and efficient auction process.²⁸ Moreover, it is reasonable to expect a winning bidder to remit its initial down payments in a timely manner because that is the bidder's first opportunity to demonstrate to the Commission that it has the financial capability of deploying and operating a communications system to provide service to the public.²⁹ Thus, regardless of whether it specifically intends to "shop" the license, a winning bidder that cannot demonstrate its financial capability at the initial down payment deadline is an insincere bidder insofar as its failure to pay its winning bid undermines the goal of the auction process of awarding spectrum to those that value it most highly. Accordingly, the Commission consistently has denied requests for waivers of the initial down payment deadline, and we find no reason to deviate from that precedent here.

9. Equally unavailing is Aircom's latest contention³⁰ that its failure to remit the required down payment was the result of a minor, inadvertent error, and that it had "demonstrable financial viability" at the time of the deadline.³¹ In support of this new argument, AirCom submits a letter from Banco Nacional de Mexico written on behalf of Ms. Daniela Castro Arellano stating that "because of technical difficulties" it was not possible to send \$198,913.00 to the Commission.³² The letter offers to hold the funds "for eventual credit."³³ Based on this letter, AirCom argues that it was in fact financially capable of constructing and operating a communications system at the time of the initial down payment deadline.³⁴

²⁶ See Petition at 9-10.

²⁷ *Order*, 16 FCC Rcd at 17687-88 ¶ 8.

²⁸ BDPCS, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 17590, 17598-99 ¶16 (2000) (*BDPCS MO&O*).

²⁹ See, e.g., *id.* at 17598-99 ¶ 15; Phoenix Data Communications, Inc., *Order on Reconsideration*, 14 FCC Rcd 21122, 21124 ¶ 5 (WTB PSPWD 1999).

³⁰ Section 1.106 of the Commission's Rules permits a petitioner's reliance on new facts if, among other things, it is determined that consideration of the facts relied on is required in the public interest. 47 C.F.R. § 1.106(c)(2). In light of petitioner's claim that it proposes to offer telecommunications services to rural and underserved populations, we find that it is in the public interest to consider the new facts and circumstances presented by AirCom.

³¹ See Petition at 10.

³² Letter dated June 1, 1999 from Kenneth Roach Sanchez, Director of Lomas Equity, Banco Nacional de Mexico, to Shirley Hanberry and/or Gail Glasser, Federal Communications Commission (Banco Nacional Letter).

³³ *Id.*

³⁴ Petition at 10, 12-13.

10. We find Aircom's vague contentions of "technical difficulties" and "financial viability" to have no merit. In particular, AirCom's reliance on case law to support these arguments is entirely misplaced. None of the cases cited by AirCom involve a winning bidder that failed to satisfy a payment requirement immediately following the close of an auction.³⁵ Instead of supporting Aircom's claims, the cited cases reflect the Commission's purposeful distinction between defaults at the initial down payment deadline and those that arise far later.³⁶ The inapplicability of the cited precedent notwithstanding, Aircom's arguments are also fraught with deficiencies, not the least of which is the fact that Mr. Castro was not the applicant. As the Branch correctly held, Mr. Castro's alleged failure to submit the outstanding portion of Aircom's down payment is not a sufficient basis upon which to grant a waiver. Under the Commission's rules, Mr. Castro was not an applicant for the licenses, and any agreements between Mr. Castro and AirCom are third party business agreements. The failure of such agreements, or the inadvertent errors suffered in connection with such arrangements, do not justify the waiver of our rules.

11. Moreover, even assuming *arguendo* that Mr. Castro's "financial viability" or "technical difficulties" were relevant to Aircom's default, we nonetheless find Aircom's arguments in this regard to be wholly unconvincing. First, while the bank's client is identified as Daniela Castro Arellano, AirCom does not explain the relationship among Ms. Arellano, Mr. Castro, and AirCom. Second, AirCom does not identify the "technical difficulties" alleged, nor does the letter explain what efforts, if any, were made to remit the payment to the Commission. Third, we note that the bank letter explicitly states that "the information contained herein is based on the customer's account statement as of this present day and it does not involve representation of solvency or lack thereof."³⁷ Fourth, the record does not reflect that Mr. Castro, Banco Nacional de Mexico, or AirCom ever made any subsequent attempt to submit the required funds to the Commission.³⁸ Fifth, AirCom does not provide any declaration from Mr. Castro stating his willingness and ability to provide the funds as of the deadline for submitting the subject down payment.³⁹ Thus, even if such issues were applicable to a waiver request for failure to meet an initial down payment deadline, and we reiterate here that they are not, AirCom has neither demonstrated that its failure to pay was due to "minor, inadvertent technical" errors nor has it proven that it had "demonstrable financial viability" at the time of the payment deadline.

12. We also disagree with the public interest arguments raised by AirCom. Specifically, AirCom argues that grant of its waiver request would serve the public interest because AirCom will use the licenses to provide communications services, including wireless telephone access, video conferencing, high speed internet access and other advanced services to underserved tribal lands and rural areas.⁴⁰ First, we note that under Section 1.925(b)(3) of the Commission's Rules, an argument that a waiver would be in the public interest is not sufficient grounds for a grant unless the petitioner also shows that grant would be

³⁵ See *id.* at 11-12.

³⁶ See Longstreet Communications International, Inc., *Order*, 12 FCC Rcd 1549 (WTB 1997); MRFI, Inc., *Order*, 12 FCC Rcd 1540 (WTB 1997).

³⁷ See Banco Nacional Letter.

³⁸ The record is void of any remittance by Mr. Castro related to AirCom's winning bid in Auction No. 23. See Petition at 5, 7, 8, 10, 12, 13, 16.

³⁹ See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2380 ¶ 183 (1994) (declining to accept even unconditional letters of credit for payment of auction obligations).

⁴⁰ Petition at 15-17.

consistent with the purpose of the rule(s) or that unique or unusual circumstances are involved.⁴¹ Moreover, we agree with the Branch's observation that "[m]aintaining the integrity of the auctions process benefits all applicants, including those that intend to serve, or are otherwise connected with Native Americans."⁴² In this regard, we find AirCom's argument to be similar to those made by small business winning bidders and rejected by the Commission that the down payment and default rules should be waived in furtherance of similar policy objectives.⁴³

13. As noted above, we also disagree with AirCom's argument that a waiver is warranted pursuant to the second prong of Section 1.925(b)(3) because its circumstances are unique and distinguishable from other waiver requests involving defaults resulting from third party breaches of contract.⁴⁴ In this instance, AirCom states that the Navajo Nation risks losing authorization for certain spectrum because of another party's failure to perform in accordance with a contract to which the Navajo Nation is not a party.⁴⁵ AirCom suggests that the Navajo Nation is not in a position to file a cause of action against Mr. Castro.⁴⁶ While that may in fact be the case, we nonetheless note that the Navajo Nation did, however, enter into a contract with AirCom.⁴⁷ As a qualified bidder⁴⁸ and as the winning bidder for the subject licenses,⁴⁹ AirCom (not the Navajo Nation or Mr. Castro) was solely responsible for complying with all payment requirements in a timely manner and, perhaps notably, had it done so, AirCom and not the Navajo Nation or Mr. Castro would have received the authorization to provide service.⁵⁰ The Commission, as a general matter, will not "police the private business activities of each bidder."⁵¹ Thus, the Branch stated that "... it is well established that a third party's failure to perform in accordance with a business agreement is not an unusual circumstance that justifies a waiver of the

⁴¹ See 47 C.F.R. § 1.925(b)(3).

⁴² Order, 16 FCC Rcd at 17690 ¶ 13.

⁴³ See *BDPCS MO&O*, 15 FCC Rcd at 17594 n. 27; Styles Interactive, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 17987, 17991-92 ¶ 7 (1997) (*Styles*). In addition, we note that the Commission has demonstrated its commitment to Native Americans and rural areas in more targeted proceedings. See, e.g., Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Notice of Inquiry*, WT Docket No. 02-381, 17 FCC Rcd 25554 (2002); Federal State Joint Board on Universal Service; Promoting Deployment and Subscription in Unserved and Underserved Areas, Including Tribal and Insular Areas, *Twelfth Report and Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, CC Docket No. 96-45, 15 FCC Rcd 12208 (2000); Extending Wireless Telecommunications Services to Tribal Lands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 99-266, 15 FCC Rcd 11794 (2000).

⁴⁴ Petition at 18-19.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 3-4, 18-19.

⁴⁸ Qualified Bidder PN, 14 FCC Rcd 6505 (identifying the qualified bidders and automatically registering each qualified bidder, including the assignment of a FCC Account Number).

⁴⁹ See Closing PN, 14 FCC Rcd at 8543-46, Attachment A. See also *BDPCS MO&O*, 15 FCC Rcd at 17598-99 ¶ 16.

⁵⁰ *Styles*, 12 FCC Rcd at 17992 ¶ 8.

⁵¹ See *BDPCS MO&O*, 15 FCC Rcd at 17604 ¶ 27; *Grand Connectivity*, 14 FCC Rcd at 13947-48 ¶ 8.

Commission's auction rules."⁵² We affirm the Branch's determination. We further believe that any determinations regarding the parties and terms of a contract or contractual remedy must be provided by a court of competent jurisdiction, not the Commission.⁵³

14. Finally, AirCom attempts to compare its alternative request to default on four licenses and retain three licenses with other instances where requests to obtain some but not all licenses were granted.⁵⁴ None of the cases relied on for comparison concern a default immediately following the close of an auction.⁵⁵ As noted earlier, this is a decisionally significant factor to protect the integrity of the auction and the underlying purpose of the Commission's down payment requirements.

IV. CONCLUSION

15. For the reasons stated above, we affirm the Branch's determinations and conclude that the Branch correctly assessed an interim default payment owed by AirCom. We also conclude that AirCom has not demonstrated that grant of a waiver of the Commission's down payment and default rules is warranted under the circumstances presented. Therefore, AirCom is in default of its Auction No. 23 payment obligations, and the Branch properly dismissed its long-form application. We note also that the Branch properly assessed an initial default payment obligation against AirCom, amounting to three percent of its defaulted net high bids for the subject licenses, in the amount of \$46,365.00.⁵⁶

V. ORDERING CLAUSE

16. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405 and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by AirCom Communications Consultants, Inc. on November 2, 2001 IS DENIED.

⁵² *Order*, 16 FCC Rcd at 17690 ¶ 14 (citing *BDPCS MO&O*, 15 FCC Rcd at 17604-05 ¶ 27; *Mountain Solution MO&O*, 12 FCC Rcd at 5908 ¶ 8; C.H. PCS, Inc., *Order*, 11 FCC Rcd 9343, 9344-45 ¶ 4 (1996)).

⁵³ See Applications of PCS 2000, L.P., *Memorandum Opinion and Order*, 12 FCC Rcd 1681, 1691 ¶ 23 (citing Milford Broadcasting Co., *Hearing Designation Order*, 8 FCC Rcd 680 (1993); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 77 (1982); *United Telephone Company of the Carolinas, Inc. v. FCC*, 559 F.2d 720, 732 (1977); *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950)).

⁵⁴ Petition at 20-21.

⁵⁵ LMDS Communications, Inc., *Order*, 15 FCC Rcd 8618 (WTB PSPWD 2000); Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, to John A. Prendergast, counsel for New Wave Networks, L.L.C., 14 FCC Rcd 6323 (1999); Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Stephen Kaffee, counsel for Entertainment Unlimited, Inc., 14 FCC Rcd 4026 (1999). We also note that AirCom, not the Navajo Nation, was the qualified and winning bidder in the auction.; see also Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Eric W. DeSilva, counsel for Progeny LMS, L.L.C., 14 FCC Rcd 13954 (1999). Here the bid withdrawal and subsequent default penalties were invoked to keep Progeny in compliance with other Commission Rules.

⁵⁶ Consistent with Commission precedent, the disposition of the remaining amount of monies on deposit with the FCC related to this matter will be addressed separately. See Entertainment Unlimited, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 10030, 10034 ¶ 12 (2001). We note \$46,365.00 is the initial default and may be amended pursuant to 47 C.F.R. § 1.2104(g)(2).

17. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau